

The Marriage and Civil Partnership (Scotland) Act 2014: the equality and human rights implications for the workplace and service delivery

Introduction

The Marriage and Civil Partnership (Scotland) Act 2014 (the Act) extends marriage to same sex couples in Scotland. This guide explains the impact of the Act on the workplace and on the provision of services to the public. The guidance is applicable to workplaces and service providers of all sizes in the public, private and voluntary sectors. This document is useful for employers, employees, service providers and customers.

Rights under equality law protect against unlawful discrimination and harassment based on various protected characteristics, including marriage and civil partnership, religion or belief, sexual orientation and gender reassignment. Human rights law also provides protection against discrimination in the enjoyment of certain rights, and protects the right to freedom of thought, conscience and religion, freedom of assembly and freedom of expression. Our accompanying guidance on marriage and the law covers these rights in greater detail.

Key points

- Employees are free to hold whatever belief they choose, whether religious or philosophical, on same sex relationships and on marriage of same sex couples: employers cannot interfere with this right.
- Employees are free to express these views in public and at work, provided that this does not interfere with the rights of others.

- Employers have duties to protect employees from unlawful discrimination and harassment based on protected characteristics, including marriage and civil partnership, religion or belief, sexual orientation and gender reassignment.
- The Act places no obligation on religious or belief bodies and their celebrants to solemnise marriages of same sex couples where they do not wish to do so.
- Authorised registrars, as public servants, are required to marry all couples without discrimination, in line with their statutory duties.
- Service providers must comply with duties under the Equality Act 2010 (the Equality Act) not to unlawfully discriminate against customers based on protected characteristics, including religion or belief and sexual orientation.
- Service providers cannot treat customers less favourably, or refuse to provide them with services, on the basis that they are married to a person of the same sex or in a civil partnership, as opposed to being married to a person of the opposite sex. This would be unlawful sexual orientation discrimination under the Equality Act, unless a specific exemption under that Act applies.
- Exceptions remain in place for religious or belief bodies from certain requirements in the Equality Act to preserve their religious or belief ethos, and to allow them to act in conformity with their doctrines and practices. These exceptions have been extended in respect of marriage and civil partnership ceremonies.

General impact on employers and employees

The purpose of the Act is to extend marriage to same sex couples under the law of Scotland, whilst at the same time protecting freedom of thought, conscience and religion.

Explicit legal protection is provided under the Act for religious or belief bodies and their celebrants when they choose not to solemnise marriages of same sex couples. The Act provides that there is no obligation to conduct such marriages. There is also protection for those who play an integral part in religious or belief marriage ceremonies but who do not wish to take part in same sex marriages. This is discussed further in the guidance on marriage and the law.

Rights under equality and human rights law also protect employees more generally. Duties apply to employers under the Equality Act not to discriminate against or harass individuals based on protected characteristics, including marriage and civil partnership, religion or belief, sexual orientation and gender reassignment, or to victimise individuals who carry out protected acts under the Equality Act. Statutory codes of practice listed at the end of this guidance further explain those concepts and requirements.

In addition, the European Court of Human Rights (ECtHR) decided in 2013 in *Eweida & Others v United Kingdom* that religious or belief freedom rights under the European Convention on Human Rights do apply at work. (For further details, see the EHRC's guidance on *Religion or belief in the workplace: an explanation of recent European Court of Human Rights judgments*). This is available at:

<http://www.equalityhumanrights.com/publication/religion-or-belief-workplace-explanation-recent-european-court-human-rights-judgments>

The Act protects the right to freedom of expression as set out in Article 10 of the Convention. The Scottish Government considers the belief that marriage can only be between a man and a woman is a belief worthy of respect in a democratic society, as is the belief that marriage includes same sex marriage

The right to free expression can be limited where appropriate and necessary to protect the rights of others. People are free to express personal views on the marriage of same sex couples, depending on the form of words used and the particular context in which they are used. This applies to all forms of communication in public and in the workplace. Individuals who express support for, or opposition to, marriage of same sex couples, in public or at work, should do so in reasonable and moderate terms.

The Lord Advocate has published prosecutorial guidance in relation to public order offences, which can be found at

http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/PROSECUTION%20GUIDANCE%20IN%20RELATION%20TO%20SAME%20SEX%20MARRIAGE.pdf. This recognises the importance of being able to hold and impart views, including opposition to marriage of same sex couples. Where comments or behaviour do not incite hatred and are not intended to cause public disorder they will not be subject to criminal prosecution.

Comments made at work that constitute unlawful discrimination or harassment based on a protected characteristic (such as religion or belief and/or sexual orientation) could result in civil law liability and sanctions for both the employer and the responsible employee. The codes of practice listed at the end of this guidance explain this in greater detail.

Impact on authorised registrars

The Act provides that civil marriage ceremonies of same sex couples may take place at registrars' offices or any other premises agreed between the couple and the registrar (so long as these are not religious or belief premises). Authorised registrars, as public officials, are required to perform their statutory duties without discrimination: this means that they will be expected to marry all couples, whether opposite sex or same sex. However, local authorities, like other employers, must, where appropriate and reasonable, take account of the religion or belief of their employees, as outlined in the guidance issued by the EHRC on *Religion or belief in the workplace: an explanation of recent European Court of Human Rights judgments*.

An authorised registrar whose religious or other belief prevents them undertaking all the responsibilities of their public office following the Act can explore the potential options with their employer. However the legal framework does not expressly permit employers to grant individuals an exemption from any part of their duties as a registrar. Parliament did not provide an exemption for this purpose in the Act and it is therefore most likely

that granting one **is** not a permissible option, although this has yet to be explicitly tested in the courts. The Scottish Government has stated that it is for each local authority to decide how best to provide its services relating to the registration of marriage and that they expect that local authorities would handle registrars who raise such issues sensitively.

Impact on employed chaplains

Chaplains often represent religious or belief bodies, as well as working in non-religious settings such as hospitals, prisons, the armed forces, further and higher education institutions and schools. They may be employed by the institution, a diocese, a local charitable trust, some form of chaplaincy council or other organisation. They may be ordained ministers or lay ministers. They may be employed or they may be unpaid volunteers or paid an honorarium. Their particular 'work' circumstances will be relevant to whether the employment provisions of equality law and human rights protections are engaged.

Chaplains who work on a voluntary basis are not protected under the work-related provisions of the Equality Act. However, volunteer chaplains have religious freedom (Article 9) and freedom of expression (Article 10) rights which are engaged in their work as chaplains for public authorities, such as schools, prisons or hospitals. The State, including public authorities, has obligations in law to protect those rights and to act compatibly with them.

During employment recruitment and in the course of their employment, chaplains are protected against unlawful discrimination and harassment based on religion or belief, and from unlawful victimisation if they have carried out any action protected by the Equality Act.

Chaplains are in a different position from other employees and office holders as they are bound by the doctrines, decisions and restrictions legitimately imposed by the religious or belief bodies to which they are affiliated. Therefore they cannot marry same

sex couples where their religious or belief body has decided not to opt in. This is because in these circumstances chaplains are not authorised by law to do so.

The Act places no obligation on religious or belief celebrants, including chaplains, to marry same sex couples. Thus if they belong to a religious or belief body which has opted in to marry same sex couples (by becoming a prescribed body or nominating celebrants), the Act places no obligation on them to solemnise such a marriage if they choose not to do so.

Chaplains may work in non-religious settings, such as hospitals, prisons or universities, but this does not restrict their freedom to hold their own beliefs about marriage of same sex couples. As religious or belief celebrants, chaplains have a justifiable expectation that they will be allowed to act in accordance with their beliefs. What they do and say in that context generally should not affect how they are treated in the workplace. NHS Scotland has produced useful guidance on spiritual care and chaplaincy <http://www.nes.scot.nhs.uk/media/3723/spiritualcaremattersfinal.pdf>.

Pensions

The Scottish Government has legal powers in relation to some Scottish public services pensions and is considering whether legislative change is necessary in relation to same sex marriage.

The law in relation to all other pensions is reserved. The UK Government has decided that, with the exception of opposite sex married couples where one spouse changes their legal gender, married same sex couples will be treated in the same way as civil partners with regards to the state pension for a spouse or surviving spouse and survivor benefits in occupational pension schemes. The effect of this is that the period in which rights to survivor benefits can be accrued may be limited. Our guidance on marriage and the law provides further explanation on this particular point.

The UK Government is also currently carrying out a review to understand fully the implications of equalising occupational pension rights in both private and public pension schemes.

Changes to the Equality Act

As explained in more detail in our related guidance, marriage and the law, pre-existing exceptions from the requirement not to discriminate in relation to work based on sexual orientation or religion or belief remain in place for religious or belief organisations.

Schedule 3 to the Equality Act has been amended to prevent religious and belief organisations and their representatives from being successfully challenged under Part 3 of that Act (concerning the provision of services and exercise of public functions) when they choose not to marry same sex couples or to make premises which they control available for such marriages.

Impact on commercial service providers

A refusal to provide services to customers because of sexual orientation constitutes unlawful sexual orientation discrimination under the Equality Act. Consequently, it is unlawful for individuals and organisations who provide services to the public (whether or not for payment) to refuse to provide those services to same sex couples if they would provide those services to opposite sex couples. This could arise, for example, in the context of a marriage of a same sex couple where the services of a commercial florist or photographer are sought for the marriage ceremony and where the service provider would be prepared to provide that service for an opposite sex couple.

Furthermore, it has already been established by the courts that it is unlawful for the owners of a commercial bed and breakfast business to refuse a double room to a couple in a civil partnership on the basis that it restricts double rooms to married couples.

The Equality Act distinguishes between religion or belief organisations whose sole or main purpose is commercial and those whose main purpose is not, in terms of the operation of exceptions to the duties of the Equality Act concerning the provision of services, the use and disposal of premises, and membership of, and benefits provided by, associations. This is intended to enable religious or belief bodies to act according to their doctrines or purposes or in accordance with the strongly held conviction of a significant number of their followers. It applies to bodies whose purpose is to practise, advance or teach the practice or principles of a religion or belief, and to enable people to receive any benefit or engage in any activity within the framework of that religion or belief. This exception also covers people working on behalf of, or under the auspices of, the religious or belief body.

Religious or belief bodies whose sole or main purpose is not commercial are free to restrict membership, participation in activities, the provision of goods, facilities or services and the disposal or use of premises for reasons relating to religion or belief or sexual orientation without breaching the services, premises and/or associations provisions of the Equality Act (parts 3, 4 and 7 respectively).

In addition, it is legitimate for religious or belief bodies to restrict membership, participation in activities, the provision of goods, facilities or services and the disposal or use of premises for reasons relating to religion or belief (but not sexual orientation) for the purpose of fostering or maintaining good relations between persons of different religions or beliefs.

All of those exceptions do not apply to anything done by the religious or belief body on behalf of, and under the terms of a contract with, a public authority.

Impact of the equality duty

In addition to their duties as employers and service providers, public authorities have separate duties under the Equality Act: these are explained in our guidance for public authorities. They include anti-discrimination duties when carrying out public functions

and a duty to have due regard to equality matters as set out in section 149 of the Equality Act (known as the equality duty).

The equality duty places a general duty on public authorities and those exercising public functions to have 'due regard' when exercising their functions to three needs: a) eliminating conduct (such as discrimination, harassment and victimisation) that is prohibited by the Act, b) advancing equality of opportunity between those who share a protected characteristic and those who do not, and c) fostering good relations between people who share a protected characteristic and those who do not.

The latter two matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.

The duty to have 'due regard' is not a duty to deliver prescribed or particular outcomes. It is not a duty, for example, to prioritise one aspect of equality over another. The equality duty could not be used to unjustifiably disadvantage religious or belief organisations or their officials who choose to exercise their right under the Act not to conduct or participate in religious marriage ceremonies of same sex couples.

The EHRC's Scottish Technical Guidance on the equality duty provides more guidance on how this aspect of equality law operates, including further details about the meaning of each protected characteristic and the contexts in which they do or do not apply.

Further information

The EHRC has published a series of complementary guidance documents:

[*The Marriage and Civil Partnership \(Scotland\) Act 2014: the equality and human rights implications for public authorities*](#)

[*The Marriage and Civil Partnership \(Scotland\) Act 2014: the equality and human rights implications for religious organisations*](#)

[*The Marriage and Civil Partnership \(Scotland\) Act 2014: the equality and human rights implications for the provision of school education*](#)

[*The Marriage and Civil Partnership \(Scotland\) Act 2014: the equality and human rights implications for marriage and the law in Scotland*](#)

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